A

BANK KERJASAMA RAKYAT MALAYSIA BHD v. GM HEALTHCARE SDN BHD & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
B ABU BAKAR JAIS JCA
AHMAD ZAIDI IBRAHIM JCA
[CIVIL APPEAL NOS: W-02(W)-369-02-2018
& W-02(W)-435-02-2018]
20 JULY 2023

C

Abstract – *(i) When the principal debtor is excused or its liability is terminated, the guarantor is discharged from his secondary obligation; (ii) A counterclaim could not be maintained unless it is shown that the relief claimed is sufficiently connected with or allied to the subject matter* D *of the principal claim as to make it necessary in the interests of justice that it should be dealt with along with the claim.*

BANKING: *Banks and banking business – Facilities – Bank acted as financier/ lender for building project – Bank informed main contractor and subcontractor that* E *it would pay subcontractors and suppliers directly – Bank made payment of balance contract proceeds to main contractor only after deducting amounts towards settlement of facilities given to subcontractor – Deed of assignment, which one should prevail – Whether bank breached agreement to pay subcontractors and suppliers – Whether amount held back by bank for suppliers and subcontractors was* F *de minimis*

CONTRACT: *Agreement – Breach – Banking facilities – Bank acted as financier/ lender for building project – Bank informed main contractor and subcontractor that it would pay subcontractors and suppliers directly – Bank made payment of balance contract proceeds to main contractor only after deducting amounts towards* G *settlement of facilities given to subcontractor – Whether bank breached agreement to pay subcontractors and suppliers – Whether there was inducement by subcontractor for bank to breach agreement with main contractor – Whether main contractor acted wrongly in having bank breach contract*

H ***CONTRACT:*** *Guarantee – Guarantor – Bank acted as financier/lender for building project – Bank informed main contractor and subcontractor that it would pay subcontractors and suppliers directly – Bank made payment of balance contract proceeds to main contractor only after deducting amounts towards settlement of facilities given to subcontractor – Whether guarantors could still be bound when bank breached agreements with principal borrower – Whether guarantors discharged* I *from secondary obligation – Whether procedurally correct for bank to counterclaim against guarantors*

There were two appeals. In the first appeal, the appellant was Bank Kerjasama Rakyat Malaysia Bhd ('bank') and the respondents were GM Healthcare Sdn Bhd ('GMH'), Sunshine Fleet Sdn Bhd ('Sunshine'), Frontier Structure Sdn Bhd ('Frontier') and four individuals ('Appeal 369'). In the second appeal, the appellant was Sunshine and the respondents were GMH, Elvin Toh ('Elvin') and the bank ('Appeal 435'). The two appeals emanated from a contract to build the Shah Alam Hospital ('project'). The bank was the financier/lender for the project. GMH was the subcontractor and Sunshine was the main contractor. Frontier was the corporate guarantor for the project's finance facilities granted by the bank to GMH. Elvin was the CEO of GMH and the rest of the individuals were the personal guarantors for the facilities granted by the bank to GMH. Jabatan Kerja Raya ('JKR'), a non-party to the appeals, was the employer of the project. Disputes arose as the bank had made a payment of the balance contract proceeds to Sunshine and not GMH after deducting some amounts towards the settlement of the facilities given to GMH. The contract proceeds were paid by JKR into the project's account at the bank. Sunshine asserted that it was entitled to this payment while GMH's case was that the bank had wrongfully paid Sunshine, in contravention of the facilities agreements between the bank and GMH. Sunshine commenced an action at the High Court against GMH, Elvin and the bank ('main suit'). GMH counterclaimed against Sunshine and the bank ('first counterclaim'). The bank counterclaimed against GMH, Frontier and the four individuals ('second counterclaim'). Frontier and the four individuals counterclaimed against the bank and Sunshine ('third counterclaim'). The High Court: (i) dismissed the main suit; (ii) allowed the first counterclaim; (iii) dismissed the second counterclaim; and (iv) allowed the third counterclaim as only against the bank. Hence, the present appeals. Appeal 369 was in relation to the first, second and third counterclaims while Appeal 435 concerned the main suit. The issues that arose were, *inter alia*, (i) which deed of assignment ('DOA') should prevail. The first DOA was given by Sunshine on 22 May 2009, the second DOA was given by GMH also on 22 May 2009 and the third DOA was given by Sunshine on 16 July 2009; (ii) whether the bank breached the agreement to pay GMH's suppliers and subcontractors; (iii) whether the amount held back by the bank for GMH's suppliers and subcontractors was *de minimis*; (iv) whether the guarantors could still be bound as the bank had breached its agreement with GMH as the principal borrower; (v) whether GMH induced the bank to breach its agreement with Sunshine; (vi) whether Sunshine acted wrongly in having the bank to breach the contract; (vii) whether there was agreement to increase the percentage of entitlement; (viii) whether there was a case against Elvin by Sunshine; and (ix) whether it was procedurally correct for the bank to counterclaim against the guarantors.

A B C D E F G H I

Held (dismissing appeals)
Per Abu Bakar Jais JCA delivering the judgment of the court:

(1) Sunshine gave the first DOA to the bank merely as security because the bank had given the facilities to GMH. However, Sunshine was not the customer of the bank. There was no concrete evidence that GMH, who was the customer of the bank, knew or agreed to the third DOA. Even if GMH had knowledge of the same, there was still no agreement and consent of the terms of the third DOA by GMH. The consent could not be present just because GMH was aware of the same. Further, since Sunshine agreed to absolutely assign all its rights under the first DOA, there was nothing further to assign under the third DOA. The first DOA was still good and valid and the same had not been legally revoked. (paras 122, 124, 125 & 126)

(2) There was evidence that the bank by way of a letter, had informed GMH and Sunshine that in ensuring the project was not impeded, the bank would pay the subcontractors and suppliers directly and not be involved in the dispute between GMH and Sunshine. It was not true for the bank to assert that it did not make such payment as the directors of GMH had failed to provide the bank with GMH's list of creditors. There were letters sent by GMH to the bank that showed GMH had informed the bank that if it did not pay the suppliers and subcontractors, the bank would be in breach. The bank failed to remit the balance proceeds to GMH's account after initially doing so. This was another instance of the breach of contract on the part of the bank. (paras 131-133)

(3) The withholding of RM1,447,443.38 by the bank against GMH was not *de minimis*. The bank did not plead the allegation that this amount was *de minimis.* This amount was still needed to keep the project going. This amount, although relatively small in comparison to the value of the project of RM400,900,000, must still be paid to GMH for the construction of the project to run smoothly. In consequence, the withholding of this amount by the bank was a breach of contract and breach of the instruction of GMH to the bank that its suppliers and subcontractors be paid directly by the bank. (paras 134-137)

(4) The bank had breached the contract with GMH. There was no basis for the bank to claim against the guarantors. The guarantors for GMH could not be held liable for the arrangements between the bank and GMH. (para 138)

(5) There could not be a breach by the bank against Sunshine as the latter had agreed to absolutely assign all its rights under the first DOA. Therefore, there was nothing further to assign under the third DOA and thus, the third DOA was invalid and of no legal effect. As a

consequence, GMH could not induce any breach by the bank against Sunshine. There was simply no agreement between the bank and Sunshine for GMH to induce the bank to breach against Sunshine. (paras 141 & 142)

(6) Sunshine, by its written representations, demands and various meetings with the bank's officers, brought persistent actions against the bank causing the bank to erroneously not pay interim payment No. 29 to GMH or to GMH's suppliers and subcontractors. The actions were brought by Sunshine's unlawful reliance on the third DOA. The bank too was under the mistaken understanding that it was bound by the third DOA. Both Sunshine and the bank's erroneous understanding of the third DOA obviously was at the expense of GMH and its suppliers and subcontractors. Hence, GMH could not be liable for the main suit between Sunshine against GMH and the bank's counterclaim against GMH. Sunshine's actions amounted to the tort of interference and induced the bank to breach its contract with GMH. (paras 147-149)

(7) There was no evidence to indicate that GMH agreed to Sunshine's entitlement of 9.8% of the balance proceeds and not 5%. At best, there was only a negotiation for that percentage of balance proceeds to Sunshine but this was not agreed to by GMH at any point of time. (para 151)

(8) Elvin was made the defendant in the main suit by Sunshine. However, the trial judge did not find evidence against Elvin proven by Sunshine. In fact, the trial judge found no valid cause of action against Elvin that had been made out by Sunshine. There was no reason to dispute the judge's findings. Merely for Sunshine to assert that Elvin had misrepresented by saying that GMH was liable to complete the project was not sufficient. Indeed, in order for the project to be completed, surely GMH would need financial facilities. This was without dispute provided by the bank initially and Sunshine was fully aware of it. (paras 152 & 153)

(9) The bank filed the action to counterclaim against GMH. By the counterclaim, the bank added the guarantors as parties. It was based on the personal guarantee and joint and several guarantees. When the writ was filed and the defence filed by the bank, there was no cause of action against the guarantors. The bank's counterclaim against the guarantors was correctly decided by the trial judge to be premature as the counterclaim was filed against the guarantors before the cause of action accrued. The trial judge was also not wrong in finding that the bank's counterclaim against the guarantors had no relation to Sunshine's claim against the bank. The bank's counterclaim was procedurally defective. (paras 154, 157 & 160)

Case(s) referred to:
Direct Express (M) Sdn Bhd v. Affin Bank Bhd [2016] 1 LNS 118 HC ***(refd)***
Esso Standard Malaysia Bhd v. Southern Cross Airways (Malaysia) Bhd [1972] 1 LNS 31 HC ***(refd)***
Mayban Finance Bhd v. Yau Jiok Hua & Anor [2007] 7 CLJ 609 HC ***(refd)***
Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka M.R.L. Murugappa Chettiar, Simati) v. Lee Teck Mook [1995] 2 CLJ 545 CA ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***
Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(refd)***
Paul Murugesu Ponnusamy Sebagai Wakil Nalamah Sangapillay (P) (Simati) v. Cheok Toh Gong & Ors [1996] 2 CLJ 397 SC ***(refd)***
Sio Koon Lin & Anor v. SB Mehra [1980] 1 LNS 135 FC ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 31

For the appellants
Bank Kerjasama Rakyat Malaysia - Malik Imtiaz Sarwar, Wong Ming Yen; M/s Malik Imtiaz Sarwar
Sunshine Fleet Sdn Bhd - Muhammad Afiq Qiwamuddin Mustapha Shakri; M/s The Law Chambers of Arbain Aziz
For the respondents
GM Healthcare Sdn Bhd - Chua Zhi Bin
T Gunaseelan S Thambinathan - Keshvinjeet Singh Sidhu; M/s Gunaseelan & Assocs
Frontier Structure Sdn Bhd, Ahmad Zaim Hilmi, Ooi Boon Seng & Ng Lee Sen - K Kirubakaran; M/s Shui Tai

[Editor's note: For the High Court judgment, please see Sunshine Fleet Sdn Bhd lwn. GM Healthcare Sdn Bhd & Yang Lain [2015] 1 LNS 657 (affirmed).]

Reported by Lina E

JUDGMENT

Abu Bakar Jais JCA:

Appeals And Parties

[1] There are two appeals before this court. First is appeal W-02(W)-369-02-2018 ("369"). Second is appeal W-02(W)-435-02-2018 ("435"). In respect of appeal 369, the appellant is Bank Kerjasama Rakyat Malaysia Berhad ("the bank") and the respondents are GMH Healthcare Sdn Bhd ("GMH"), Sunshine Fleet Sdn Bhd ("Sunshine"), Frontier Structure Sdn Bhd ("Frontier"), Ahmad Zaim bin Hilmi, Chua Zhi Bin, Ooi Boon Seng and Ng Lee Sen. In respect of appeal 435, the appellant is Sunshine and the respondents are GMH, Elvin Toh Chen Vin ("Elvin") and the bank.

[2] Thus, it should be borne in mind, the two appellants before us are the bank in appeal 369 and Sunshine in appeal 435. We say this as to remind ourselves with the grievances of these two parties coming before us as appellants against the decisions of the High Court ("HC"). The arguments before us by other parties as the respondents, of course, though relevant and noted in our present grounds of judgment, could not be the primary focus as they are simply not the appellants before this court.

Background Facts

[3] These two appeals emanate from a contract to build the Shah Alam Hospital ("project"). The bank is the financier or lender for the project. GMH is the subcontractor and Sunshine is the main contractor for the project. Frontier is the corporate guarantor for the project finance facilities granted by the bank to GMH. Elvin is the CEO of GMH and the rest of the individuals are the personal guarantors for the facilities granted by the bank to GMH. Jabatan Kerja Raya ("JKR"), a non-party to the appeals is the employer of the project.

[4] Disputes essentially arose because the bank made payment of the balance contract proceeds to Sunshine and not to GMH after deducting some amounts towards the settlement of the facilities given to GMH. The contract proceeds were paid by JKR into the project account at the bank. Sunshine asserts it is entitled to this payment and GMH's case is that the bank had wrongfully paid Sunshine, in contravention of the facilities agreements between the bank and GMH.

At The HC

[5] The main suite at the HC was between Sunshine as the plaintiff against GMH as the first defendant, Elvin as the second defendant and the bank as the third defendant.

[6] GMH then counterclaimed against Sunshine and the bank ("the first counterclaim").

[7] The bank also counterclaimed against GMH as the first defendant, Frontier as the second defendant, Ahmad Zaim bin Hilmi, Zainol bin Che Mama, Chua Zhi Bin, Ooi Boon Seng and Ng Lee Sen as the other defendants ("the second counterclaim").

[8] While Frontier, Ahmad Zaim bin Hilmi, Zainol bin Che Mama, Ooi Boon Seng and Ng Lee Sen counterclaimed as the plaintiffs against the bank as first defendant and Sunshine as the second defendant ("the third counterclaim").

[9] Zainol bin Che Mama passed on during the trial at the HC. The bank did not proceed against the estate of the deceased.

[10] At the HC, the learned judge decided that:

(i) the main suite by Sunshine is dismissed;

(ii) the first counterclaim by GMH is allowed;

(iii) the second counterclaim by the bank is dismissed; and

(iv) the third counterclaim is allowed as against the bank and dismissed against Sunshine.

[11] Thus, before us, with regards to appeal 369, it is in relation to the first counterclaim against the bank which was allowed by the HC, the second counterclaim by the bank which was dismissed, and the third counterclaim against the bank which was allowed. With regards to appeal 435, it is in relation to Sunshine's claim in the main suite which was dismissed at the HC and the first counterclaim by GMH against Sunshine which was allowed. Thus, aggrieved by the decisions of the High Court, the bank and Sunshine as the appellants are before us for the appeals. As can be seen, these two appeals are related.

Summary Of Findings And Decisions Of The Learned Judge At The HC

[12] For the facilities granted to GMH by the bank, the learned judge found that the financial arrangement agreed for the project is that JKR will pay the proceeds for the project based on interim certificates into the project account at the bank. The bank will then deduct some amounts towards repayment of the facilities by GMH. The balance will be paid to GMH. From this balance, GMH would pay 5% to Sunshine.

[13] GMH said the balance proceeds should have been paid to its account at Asian Finance Bank Bhd ("AFB"). Sunshine in turn said it should be paid to its account at Maybank Islamic Bhd ("MIB"). Sunshine said it is entitled to 9.8% of the balance proceeds and not 5%. As there were disputes between GMH and Sunshine, the latter terminated the subcontract between the two. JKR subsequently terminated the contract with Sunshine. The bank in turn terminated the facilities for GMH.

[14] The learned judge found that two deeds of assignment were given to the bank by GMH and Sunshine respectively for the banking facilities granted to GMH. The deed given by GMH is dated 22 May 2009 ("GMH's DOA 22 May 2009") and the deed given by Sunshine is also of the same date. ("Sunshine's DOA 22 May 2009") Both allowed the bank to control the proceeds from JKR before the same are paid to GMH and Sunshine.

[15] Sunshine's DOA 22 May 2009 states that Sunshine had assigned absolutely the proceeds to the bank. The notice of assignment with regards to Sunshine's DOA 22 May 2009 was also given to JKR by Sunshine, stating that it assigned all proceeds to the bank. Sunshine had also instructed JKR irrevocably to pay the proceeds to its account at the bank.

[16] Sunshine also wrote to the bank saying it agreed to the assignment by GMH with regards to GMH's irrevocable DOA 22 May 2009 to the bank.

[17] JKR wrote to Sunshine on 22 April 2009 stating it has no objection to deposit the proceeds due to the latter in Sunshine's account at the bank.

[18] The learned judge also found that all contract proceeds were paid by JKR to Sunshine and not GMH. Hence, GMH's DOA 22 May 2009 is a dead letter as GMH could not possibly assigned any proceeds to the bank. The material assignment is Sunshine's DOA 22 May 2009 given to the bank assigning absolutely all proceeds coming from JKR to the bank by Sunshine.

[19] The learned judge however found that Sunshine is not the customer of the bank and did not have a project account or any account at the bank. Sunshine's DOA 22 May 2009 was provided to the bank only as a security for the banking facilities granted to GMH. Sunshine assigned all proceeds from JKR to the project account at the bank.

[20] There is another deed of assignment from Sunshine given to the bank dated 16 July 2009 ("DOA – 16 July 2009"). The learned judge said DOE – 16 July 2009 is a problematic security. The bank's counsel admitted GMH is not aware of the DOA – 16 July 2009 given by Sunshine to the bank.

[21] The letter of offer from the bank to GMH for the banking facilities states that the bank is entitled to 10% of the proceeds towards repayment by GMH for the facilities granted by the bank. The bank is also entitled to a further 5% of the proceeds towards payment for the sinking fund. The learned judge concluded that the balance after these deductions of the proceeds in the project account could not be paid to Sunshine, a non-customer of the bank. Instead, the learned judge is of the view that the balance should be paid to GMH, a customer of the bank. Besides, Sunshine's DOA 22 May 2009 or GMH's DOA 22 May 2009 did not state that Sunshine is entitled to this balance in the project account.

[22] In the grounds of judgment, the learned judge said there is no reason to allow Sunshine's claim against Elvin. Essentially, there is no cause of action against Elvin according to the learned judge.

[23] In respect of GMH, the learned judge found it is acceptable and reasonable for it to seek project financing from financial institutions. In this regard, Sunshine did not object to GMH seeking facilities from the bank. In fact, this is proven by Sunshine's DOA 22 May 2009.

[24] The learned judge found in respect of the DOA – 16 July 2009 given by Sunshine to the bank, the latter never obtained any consent from GMH for the same to be provided by Sunshine.

[25] Sunshine's DOA 22 May 2009 and the DOA – 16 July 2009 cover the same matter. The term "project proceeds" and "project account" refers to Sunshine DOA 22 May 2009.

[26] The bank had accepted the terms and conditions of the DOA – 16 July 2009 from Sunshine.

[27] Sunshine's claim is focused on breach of contract or inducing breach of contract or interference, rather than negligence. The claim on negligence had been abandoned *sub silentio*.

[28] There is no dispute that Sunshine's DOA – 16 July 2009 was not issued with the consent of GMH. The bank granted project financing facilities to GMH not because of Sunshine's DOA – 16 July 2009. The DOA – 16 July 2009 was given by Sunshine for other reasons and not a basis for the bank to agree to provide the facilities to GMH.

[29] SD2, a witness for the bank said the DOA – 16 July 2009 was never acted upon by the bank. What was acted upon by the bank and operative was Sunshine's DOA 22 May 2009. There is also no dispute that Sunshine's DOA 22 May 2009 was never revoked.

[30] The learned judge found that once Sunshine decided to absolutely assign its rights, interests and entitlements of the contract proceeds pursuant to Sunshine's DOA 22 May 2009, there is nothing further to assign. Thus, the DOA – 16 July 2009 which was given subsequently by Sunshine to the bank is of no consequence and hence invalid. This is more so as Sunshine's DOA 22 May 2009 was never revoked, terminated, cancelled or withdrawn in any manner or form whatsoever.

[31] In view of this, Sunshine's DOA 22 May 2009 should prevail, allowing the balance of the contract proceeds to be paid to GMH and not cl. 7 of the DOA – 16 July 2009 stating that the balance sum in the project account is to be paid to Sunshine. The bank's letter of offer to GMH, the agreements pertaining to the facilities and Sunshine's DOA 22 May 2009 are all consistent with this finding.

[32] In this regard, the bank's customer is GMH and not Sunshine. Sunshine is only a security provider. Sunshine could not legally insist that the contract proceeds be paid to its MIB account pursuant to the DOA – 16 July 2009 as this deed is invalid for the reasons given above.

[33] There is no legal basis for Sunshine to issue various letters to the bank requesting the latter to pay the contract proceeds from the project account to Sunshine's MIB account.

[34] It is irrelevant that GMH may possibly have known of the DOA – 16 July 2009 as its consent was never obtained by the bank and Sunshine's DOA 22 May 2009 was never revoked.

[35] The DOA – 16 July 2009 had adversely affected GMH's ability to utilise the contract proceeds contrary to the agreements of the facilities between GMH and the bank. The payment of the contract proceeds into Sunshine's MIB account, although having joint-signatories of Sunshine and GMH, may not have ensured timely payments to GMH's suppliers and subcontractors. In fact, the letter dated 26 May 2010 from GMH to the bank, showed serious concern by GMH on this MIB account. This is material because the DOA – 16 July 2009 could not stand and is invalid.

[36] The bank's latest position is that the DOA – 16 July 2009 is a nullity and has no legal effect. All interim payments, except two were paid to GMH's AFB account. Later, only as a matter of necessity, the bank paid the suppliers and subcontractors of GMH. However, the bank's approach that they must adhere to cl. 7 of the DOA – 16 July 2009 that the balance contract proceeds be paid to Sunshine and not GMH is an egregious breach by the bank.

[37] The bank's refusal to continue paying into GMH's AFB account hampered the payments to GMH's suppliers and subcontractors. In fact, a letter from the bank dated 1 June 2010 acknowledged that it will pay the suppliers and subcontractors so that the project would continue. Therefore, when payment No 29 for RM1,447,443.38 was received by the bank on 7 June 2010, it is surprising that the bank refused to pay GMH or its suppliers and subcontractors. At this point in time, the bank was unaware of the *Mareva* injunction obtained by Sunshine, directing the contract proceeds be paid to Sunshine. The bank only knew of Sunshine's application for an injunction on 11 June 2010. Hence, the bank has no basis whatsoever to say it did not or could not make the payment to GMH or the suppliers and subcontractors because of the injunction obtained by Sunshine.

[38] Even with the knowledge of the injunction, the payment by the bank to GMH or to its suppliers and subcontractors would not be infringing on the law but would have to be considered as an ordinary course of business considering the established payment arrangement already in place and the bank's contractual obligation. It could not be said this is to defeat the application for a *Mareva* injunction by Sunshine. The bank could not be exposed to a contempt action in relation to the injunction as such payment being made is only in the normal course of business.

[39] JKR's insistence that Sunshine issue the DOA – 16 July 2009 to channel the balance project proceed to Sunshine is odd as Sunshine's DOA 22 May 2009 is still good and valid. This will also leave GMH "hanging high and dry".

[40] Sunshine writing directly to the bank and insisting that the proceeds be paid directly to its MIB account and giving conflicting instructions is a blatant interference with the banker-customer relationship between the bank and GMH to the point the bank took the erroneous position of paying the proceeds to Sunshine instead of GMH or its suppliers and subcontractors.

[41] The withholding of RM1,447,443.38 by the bank against GMH is not *de minimis*. This amount is still needed to keep the project going. This amount although relatively small in comparison to the value of the project of RM400,900,000, must still be paid to GMH for the construction of the project to run smoothly.

[42] The withholding of this amount by the bank is a breach of contract and breach of the instruction of GMH to the bank that its suppliers and subcontractors be paid directly by the bank. In this regard, the bank had written a letter saying and agreeing it will pay the suppliers and subcontractors directly.

[43] The bank breached the contract with GMH by failing to make payment into GMH's AFB account or to pay GMH's suppliers and subcontractors. Thus, GMH as principal debtor is exonerated from liability under the banking facilities.

[44] The counsel for the bank had agreed that if GMH succeeds in the counterclaim against the bank for breach of contract, the bank's claim against the guarantors will fail. Hence since GMH has indeed succeeded in the counterclaim against the bank for breach of contract, the guarantors could not be liable under the guarantees. Damages to the guarantors against the bank will be assessed.

[45] Sunshine is also implicated because of its role in this breach by the bank. The bank accepted the terms of the DOA – 16 July 2009 and this is seen in JKR's letter dated 22 July 2010 which was admitted as evidence by the learned judge.

[46] Sunshine's action and persistence by writing and meeting the bank had caused the bank not to pay interim certificate No. 29 to GMH or to GMH's suppliers and subcontractors. The bank and Sunshine must both share common liability and responsibility for the DOA – 16 July 2009 which had caused all problems and issues affecting the construction of the project.

[47] Although the bank was also at fault, it was induced by Sunshine to breach its contractual obligation to GMH and later to GMH's suppliers and subcontractors when the bank agreed and said they would be paid directly. Instead, the bank's erroneous acceptance of the terms of the DOA – 16 July 2009, meant it had to divert the payment to Sunshine and not GMH or its suppliers and subcontractors.

[48] Sunshine is also responsible for the DOA – 16 July 2009, which is a nullity in law and had without legal justification made unwarranted demands to the bank for the contract proceeds to be paid into its MIB account. The entire conduct of Sunshine amounts to an interference with the banker-customer relationship between the bank and GMH. In law, any act which hinders the parties from performing their contractual obligation, amounts to interference with the contract. Sunshine's conduct showed it had committed the tort of interference and/or liable for inducing the bank to breach its contract with GMH.

[49] Sunshine is only entitled to 5% and not 9.8% of the contract proceeds. Although there were discussions on the payment of 9.8% of the contract proceeds to Sunshine, these discussions did not lead to an agreement for such payment to be made to Sunshine. Besides, the paper trail did not prove this agreement between Sunshine and GMH. There were no documents conclusively stating that Sunshine is entitled to 9.8% of the contract proceeds. Instead, a letter of offer and intent dated 10 January 2009 from GMH made it clear Sunshine is to receive only 5% of the proceeds from JKR.

[50] There is also no truth in Sunshine's argument that GMH attempted to hijack the project from Sunshine when the former negotiated directly with JKR. There is no express provision in Sunshine's letter of award prohibiting GMH to deal directly with JKR.

[51] The bank also contended it could not pay GMH's suppliers or subcontractors for balance sum under interim certificate No. 29 as GMH had not certified the list of creditors. The learned judge is of the view that GMH had already written letters to the bank notifying that if the bank would not pay its suppliers and subcontractors, the bank would be in breach of the contract. In reply to this letter, the bank did not state that it was unable to pay GMH's suppliers and subcontractors because GMH did not certify the list of creditors.

[52] Sunshine terminated the contract with GMH on the ground that there were delays by the latter in completing the subcontract assigned to GMH. However, the learned judge did not accept there were delays by GMH as there was no evidence that LAD was imposed by JKR. The termination by Sunshine of the contract with GMH is therefore legally wrong.

[53] The purpose of the project finance being granted to GMH by the bank is frustrated with the introduction of the DOA – 16 July 2009, as Sunshine insisted that the monies in the project account be paid into its MIB account. The bank's letter dated 11 March 2009 and its solicitors letter dated 1 July 2009 showed that the bank had given effect to the DOA – 16 July 2009.

[54] Evidence showed as indicated by the guarantors, there was a 'project payment arrangement' or some arrangement (the label is not important) to deduct 15% from the contract proceeds paid by JKR into the project account and would remit the balance into GMH's AFB account.

[55] Except for two instances where GMH consented for the balance being paid to Sunshine's MIB account, it was legally wrong for the bank to rely on the DOA – 16 July 2009 without obtaining GMH's approval. This precipitated the dispute between the parties. Having agreed to pay GMH's suppliers and subcontractors by releasing the balance of the contract proceeds for interim certificate No. 29, the bank rescinded on its promise, resulting in the breach of contract.

[56] GMH is not at fault whatsoever on any alleged delays of the project as all interim claims were duly processed by JKR and the same did not impose any LAD. The delays at the later part before termination of the subcontract by Sunshine, were caused by the non-payment to GMH's suppliers and subcontractors.

[57] Sunshine had even written to JKR to delay the payment of contract proceeds to GMH. The cumulative conduct of Sunshine caused the breach of contract by the bank with GMH and therefore GMH is discharged from its obligation in view of the wrongful recall and termination of the facilities by the bank.

[58] The bank's counterclaim against the guarantors is also not procedurally consistent as the cause of action against the same has not accrued at the material time.

Summary Of Sunshine's Submissions

[59] It is contended by Sunshine that by the DOA – 16 July 2009, the bank agreed to deposit the balance progress payments received from JKR to Sunshine's MIB account. According to Sunshine, this account is held by both GMH and Sunshine. The bank instead wrongly deposited the same into GMH's AFB account without Sunshine's consent.

[60] GMH failed to perform its contractual obligations to Sunshine. GMH tried to sabotage Sunshine by negotiating directly with JKR. The suppliers and subcontractors had not been paid as the bank failed to honour its agreement to do so. GMH and the bank negligent and wrongful acts had caused JKR to terminate the contract with Sunshine.

[61] The bank's non-compliance of procedure had caused Sunshine to be deprived of its share of 9.8% proceeds for each of the interim payment from No. 24 to 32.

[62] Sunshine had appointed GMH as the subcontractor, on Elvin's representation of his experience in the construction of hospitals, mechanical and electrical works and supplying hospitals equipment. GMH, through Elvin, had made false representations about GMH's ability as an experienced hospital contractor. Thus, Sunshine had wrongly been induced to appoint GMH as the subcontractor for the project.

[63] GMH and Elvin's inabilities and incompetence had caused delays in the project. This eventually led to JKR terminating Sunshine's appointment as main contractor for the project. Sunshine suffered losses as a result of this termination.

[64] Sunshine submitted that it was correct for the learned judge to find that the bank had accepted the DOA – 16 July 2009 without GMH's consent. GMH had agreed that Sunshine is entitled to 9.8% of the proceeds from the progress payments received.

[65] The bank has a duty of care to Sunshine because of the deed of assignments provided by Sunshine. The bank must be aware that its varied payments methods will affect Sunshine. The bank breached this duty of care to Sunshine as it disbursed the interim payments without the consent of the latter.

[66] Both the bank and GMH were also negligent as no consent had been obtained from Sunshine before the interim payments were disbursed.

[67] GMH and Elvin had wrongly received the interim payments which were channelled into GMH's AFB account.

[68] There is a master collaboration agreement dated 8 October 2009 executed between Sunshine and GMH where both parties accepted and knew fully well of its terms. GMH and Elvin terminated this agreement unlawfully without prior consent from Sunshine.

[69] Sunshine also submitted that there was a draft subcontract agreement in 2009 pending execution. This, according to Sunshine should also bind GMH.

[70] All the bank's witnesses who testified in court were not credible witnesses. These witnesses have no direct knowledge of the matters that they had testified about.

[71] Sunshine has suffered losses due to the breach of contract by the bank and GMH.

Summary Of Bank's Submissions

[72] Before us the bank contended that it had obtained GMH's DOA 22 May 2009 from GMH. *Vide* GMH's DOA 22 May 2009, GMH agreed to absolutely assign all its rights to the contract proceeds to the bank. The

bank submitted it was Sunshine who was entitled to receive the contract proceeds from JKR and not GMH. Sunshine was informed by GMH about this assignment by way of a letter dated 15 April 2009.

[73] The bank had obtained Sunshine's DOA 22 May 2009 and the DOA – 16 July 2009, where in both assignments, Sunshine had absolutely assigned the contract proceeds coming from JKR. Prior to the execution of both assignments, Sunshine had given notice to JKR informing the latter that all Sunshine's rights and interests have been assigned to the bank. Sunshine also instructed JKR to disburse all sums due to the project account at the bank. JKR replied it had no objection to the same.

[74] Sunshine contended that the DOA – 16 July 2009 is the operative deed of assignment between Sunshine and the bank. Sunshine also argued that the same stipulates that the bank must disburse the balance of each interim certificate to Sunshine after necessary deductions were made by the bank.

[75] On the contrary, the bank submitted that the operative deed of assignment by Sunshine to the bank is Sunshine's DOA 22 May 2009. In any event, the bank argued there was no difference between Sunshine's DOA 22 May 2009 and the DOA – 16 July 2009. This is because Sunshine is only entitled to any monies if there is surplus after the bank made the necessary deductions towards satisfying the repayment of the facilities given by the bank.

[76] As against the bank, the original suit by Sunshine claimed that it was wrong for the bank to make payment of the proceeds to GMH instead of Sunshine as the bank is bound by the stipulation in the DOA – 16 July 2009 that balance proceeds must be disbursed to Sunshine after the necessary deductions by the bank. Sunshine had insisted in March 2010 that the bank make the disbursement into its MIB account for the balance proceeds after the deductions and should not instead disburse GMH in its AFB account. The bank contended this is wrongly submitted by Sunshine as Sunshine's DOA 22 May 2009 had completely assigned all rights and interests of Sunshine to the bank.

[77] There were no problems initially as the bank was able to deposit the proceeds in either Sunshine's MIB account and GMH's AFB account as both Sunshine and GMH had consented to the same.

[78] Problems arose when interim payments No. 24 and 25 were disbursed by JKR into the project account at the bank. GMH wrote to the bank requesting the remaining sum of interim payments No. 24 and 25 be disbursed into GMH's AFB account and giving the guarantee to the bank that GMH would indemnify the bank against any losses and claims by Sunshine. The bank agreed to GMH's request.

[79] Sunshine in turn protested, saying the bank's action on the request of GMH had failed to obtain Sunshine's consent. Sunshine also told the bank that pursuant to cl. 7 of the DOA – 16 July 2009, the remaining sum should have been disbursed by the bank to Sunshine and not GMH.

[80] GMH also wrote to the bank requesting the bank to disburse the remaining sum pursuant to interim payment No. 26 into GMH's AFB account. The bank wrote to Sunshine and Sunshine received this letter in which the bank told Sunshine that it had issued Sunshine's DOA 22 May 2009 where Sunshine assigned all its rights and interests to the bank. Therefore, the bank said it is entitled to manage the project account in order to ensure the project was not disrupted. GMH was copied this letter.

[81] Sunshine then wrote a letter to the bank regarding interim payment No. 26 requesting the bank to defer payment until it resolves its issues with GMH. Sunshine did not copy this letter to GMH. Subsequently Sunshine wrote two letters to the bank stating it withdraws its earlier letter and would not object that interim payment No. 26 be disbursed to GMH in its AFB account. The bank replied, it had disbursed the monies into GMH's AFB account.

[82] Sunshine also wrote a letter through its solicitors to the bank requesting the deferment of disbursement for interim payment No. 27. Sunshine also issued another letter stating interim payments No. 24 to 26 were released by the bank without Sunshine's consent. Subsequently Sunshine wrote a letter through its executive director to the solicitors stating the solicitors had no authority to issue the letter and requesting the letter sent by the solicitors to be retracted and instructing no more such letters to be issued. The bank and GMH were copied this letter.

[83] Sunshine then made a police report against the bank alleging interim payments No. 24 to 26 were wrongly disbursed to GMH by the bank. It is said that there were elements of syphoning and conspiracy between the bank and GMH.

[84] GMH in turn wrote to the bank saying it did not recognise Sunshine's MIB account as it is not a joint-account with GMH and GMH is not a beneficiary of the same. GMH instructed the bank that the latter should not disburse any monies from the project account into that account of Sunshine or any other Sunshine's accounts.

[85] The bank then notified Sunshine and GMH that it would not be involved in the dispute between both of them and told them to settle their dispute. The bank also told both of them that to ensure the continuity, progress and that there is no disruption of the project, the bank will disburse monies directly to the subcontractors, vendors and suppliers involved in the same and will hold on to the remaining sums in the project account until the dispute between Sunshine and GMH is resolved or until an order of the court is made.

[86] On the same day, GMH issued a letter of undertaking and indemnity in favour of the bank for the release of the balance of the interim payments to its subcontractors, vendors and suppliers for interim payment No. 27 and onwards. Thus, the balance interim payments No. 28 and No. 29 were also disbursed to GMH's subcontractors, vendors and suppliers by the bank.

[87] On 11 June 2010, the bank was served with the writ and statement of claim and an application for a *Mareva* injunction which was to restrain the bank from releasing the balance of the contract proceeds to any party until the full and final determination of the action.

[88] GMH then issued two letters to the bank stating that despite receiving interim payment No. 29 from JKR, the bank had failed to disburse the balance directly to GMH's subcontractors, vendors and suppliers as previously agreed. This according to GMH is a breach of contract by the bank. At this point in time, the application for a *Mareva* injunction by Sunshine was still pending before the court.

[89] Subsequently, the bank received a letter from the solicitors of GMH stating that the bank had failed, refused and neglected to comply in its obligations to GMH in respect of the financing facilities and therefore had caused loss and damage to GMH. It also sought confirmation whether the bank will comply with its obligations in respect of the same.

[90] The solicitors of the bank in turn replied that the bank is not obliged to make any payment of the balance of the contract proceeds to GMH under GMH's DOA 22 May 2009. Instead, pursuant to the DOA – 16 July 2009 any balance, must be paid to Sunshine and not GMH. Further, in view of the application for the *Mareva* injunction, the bank could not release any monies it received to any parties unless the court makes an order pursuant to the application for that injunction. The bank could also be exposed to an action of contempt if it ignores the court order or in the event there is wrongful dissipation of the proceeds.

[91] GMH then wrote a letter to the bank informing the bank that it had discussed all outstanding matters with Sunshine and hereby jointly and severally instruct the bank to pay the overdue amount to the suppliers, subcontractors and creditors and amount to Sunshine. It was counter signed by Sunshine.

[92] On 20 July 2010 the application for Mareva injunction was granted.

[93] Subsequently, Sunshine wrote to JKR informing that it intended to terminate its contract with GMH with immediate effect. The termination of GMH was done on 19 August 2010 and JKR terminated the contract with Sunshine on 3 September 2010.

[94] Since the termination of GMH was an event of default, the bank terminated the financing facilities for GMH by issuing letters to the same and guarantors dated 29 October 2010.

[95] The finding by the learned judge that DOA – 16 July 2009 is invalid is a correct finding as Sunshine's DOA 22 May 2009 has already absolutely assigned all rights, interests and entitlements to the bank. There is nothing further that can be assigned by the DOA – 16 July 2009. It is also a correct finding as Sunshine's DOA 22 May 2009 was never revoked in any manner.

[96] Since Sunshine's DOA 22 May 2009 is still in existence, Sunshine could not demand that the bank transfer the balance of the interim payments to it, as the bank is fully authorised to manage the contract proceeds in the project account. This is further reinforced by the fact that Sunshine is not the customer of the bank.

[97] Even the DOA – 16 July 2009 is not applicable for Sunshine as cl. 7 of the same, states that only when there is surplus after deductions towards the repayment of the financing facilities would Sunshine be entitled to the balance of the interim payments. Since the repayments of the financing facilities are still outstanding in view of the termination of the same, the DOA – 16 July 2009 could not operate for the benefit of Sunshine.

[98] In respect of the bank's appeal against the decision of the learned judge to allow the first counterclaim by GMH, the bank submitted that GMH has failed to prove that the bank has breached its facilities agreements with the same. The exact terms of the same being breached has not been proven by GMH except that GMH says that it had suffered loss in view of the termination of the facilities agreements.

[99] The bank had acted in accordance with the instructions of GMH and the facilities agreements at all material times.

[100] If at all, the crux of the complaints by GMH only started with interim payments No. 27 onwards. In respect of interim payment No. 27, problems had arisen before this interim payment between GMH and Sunshine. The bank informed GMH that it should resolve its problems with Sunshine. GMH supported the bank's position with a letter dated 1 June 2010 stating that GMH agrees that the bank pays its subcontractors, suppliers, vendors and employees until GMH is able to resolve its differences with Sunshine or until a court order is obtained stating otherwise.

[101] In respect of the second counterclaim by the bank against the guarantors, which was dismissed by the HC, the bank submitted that it is not fatal that Sunshine was not included in this counterclaim by the bank.

[102] The learned judge also had misconstrued the purpose of s. 31 of the Limitation Act 1953 which is applicable only as a defence. In this regard, the guarantors did not plead this provision as a defence.

[103] In respect of the third counterclaim that allowed by the HC against the bank, it is submitted by the bank that the learned judge erred in failing to consider the elements needed for the guarantors to prove that the relevant agreement existed to find the bank liable. There was no sufficient evidence adduced by the guarantors to prove a separate agreement existed.

Summary Of GMH And Chua Zin Bin Submissions

[104] Both parties are represented by the same counsel.

[105] The bank had agreed that the DOA – 16 July 2009 is a nullity and could not now argue otherwise. In any event the principle of *"nemo dat quod non habet"* (no one can give what they do not have) should be applied here. It is of no consequence that GMH may have notice of the issuance of the DOA – 16 July 2009 as mere notice is not agreement to the same.

[106] The bank's acceptance of the DOA – 16 July 2009 from Sunshine is a clear breach of the financial arrangement between bank and GMH. The bank should not have accepted the DOA – 16 July 2009 as Sunshine is not a customer of the bank.

[107] The bank had wrongly accepted the DOA – 16 July 2009 and then wrongly deposited the contract proceeds into the MIB account.

[108] The bank was also in breach of the financial arrangement as it decided to withhold interim payment No. 29 and not release it to GMH or its suppliers and subcontractors.

[109] The bank must accede to the instruction of GMH to deposit the balance interim payments into its AFB account as agreed and not the MIB account as insisted by Sunshine.

[110] On the contention of the bank that the withholding of RM1,447,443.38 by the bank against GMH is *de minimis*, this was not even put in cross-examination of Elvin, who also testified for GMH. In fact, this was not even pleaded by the bank. Further, this amount is still needed to pay GMH's suppliers and subcontractors which was agreed by the bank.

[111] The breaches by the bank, absolved and discharged GMH from the obligations in respect of the financing facility agreement with the bank. Even GMH's counterclaim (first counterclaim) was rightly allowed against the bank and Sunshine.

[112] The bank had breached the contract with GMH when the bank withheld the contract proceeds for interim payment No. 29 *ie*, breach of project payment arrangement. This is seen when the bank informed GMH and Sunshine that both should resolve their differences or get a court order. The balance should be kept after GMH and Sunshine resolved their differences or until a court order is obtained.

[113] Elvin testified that the bank withheld interim payments from JKR in respect of interim payments No. 27 and No. 28 amounting to approximately RM8,000,000. Elvin gave evidence that the bank paid the balance for interim payments No. 27 and No. 28 directly to GMH's suppliers and creditors. However, for interim payment No. 29, the bank failed to pay the balance to GMH's suppliers, creditors, subcontractors or GMH. The banks also wrongly withheld payment in respect of interim payment No. 30.

[114] The injunction obtained by Sunshine was on 20 July 2010. However, even before the injunction was obtained, the bank had already stopped the remaining balance payment to GMH after the bank deduct certain sum for repayment of the banking facilities granted to GMH.

Summary Of Frontier And The Rest Of The Guarantors' Submissions

[115] Frontier, as corporate guarantor and the rest as personal guarantors are represented by the same counsel.

[116] The execution of the DOA – 16 July 2009 by Sunshine for the bank was never made known to the guarantors. The guarantors never consented to the terms of the DOA – 16 July 2009. Further, the DOA – 16 July 2009 is in direct contravention with two earlier deeds given by GMH and Sunshine, the facilities agreements and the agreement by the bank to pay GMH's suppliers and subcontractors.

[117] Even before the mandatory injunction was obtained by Sunshine, the bank decided not to continue disbursing the interim payments like before to GMH's suppliers and subcontractors. Thus, there is no excuse for the bank to stop these payments to GMH's suppliers and subcontractors.

[118] The guarantors were not parties to the main suite and the second counterclaim by the bank is also dismissed as against the guarantors. This is rightly so as they are not parties in the main suite.

Our Decision

[119] The two appeals are taken together in relation to our decision. The relevant issues material to our overall decision on the two appeals are narrated accordingly as seen below.

Which Deeds Of Assignment Should Prevail

[120] A substantial aspect of the dispute in this case arose because of the two deed of assignment ("DOA"). First is the DOA on 22 May 2009, *ie*, Sunshine's DOA 22 May 2009. There is also another DOA given by GMH to the bank of similar date, GMH's DOA 22 May 2009. In fact, the learned judge found this DOA from GMH to be a dead letter. Third is the DOA – 16 July 2009 given by Sunshine to the bank.

[121] The DOA 22 May 2009 was given to the bank by Sunshine where the latter agreed that it absolutely assigned all their rights, interests and entitlements to the contract proceeds from JKR. The salient terms of the same reads:

> In consideration of the Assignee agreeing to provide the Financing Facilities to the Customer under the Security Documents *the Assignor hereby assigns absolutely to the Assignee all the Project Account now and hereafter due and payable to the Assignor under the Contract and all rights, benefits, title and interests of the Assignor in the Project Account and all remedies for enforcing the same as security for the payment by the customer and the Assignor to the Assignee of the Indebtedness.* (emphasis added)

[122] Sunshine gave this first DOA to the bank merely as security because the bank had given the facilities to GMH. However, it should be noted that Sunshine is not the customer of the bank. The DOA – 16 July 2009 was given to the bank by Sunshine where it stipulates that the proceeds from JKR should be paid to its MIB account and not to GMH in its account in AFB.

[123] Further, it is relevant to note the Federal Court case of *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231; [1984] 2 MLJ 268, where it explains that the nature of the assignment "is to be gathered only from the four corners of the instrument itself".

[124] We agree there is no concrete evidence that GMH who is the customer of the bank knew or agreed to the DOA – 16 July 2009. Even if GMH had knowledge of the same, there is still no agreement and consent of the terms of the DOA – 16 July 2009 by GMH. The consent could not be present just because GMH was aware of the same. The same point is explained by the Supreme Court in *Paul Murugesu Ponnusamy Sebagai Wakil Nalamah Sangapillay (P) (Simati) v. Cheok Toh Gong & Ors* [1996] 2 CLJ 397; [1996] 1 MLJ 843 where it is said:

> It is to be borne in mind also that mere knowledge of a variation is not consent of a variation: see *Coronation Electronics Ltd v. Lalchand Mahtani* [1987] 1 MLJ 190.

[125] Further, since Sunshine agreed to absolutely assign all its rights under Sunshine's DOA 22 May 2009, we also agree there was nothing further to assign under the DOA – 16 July 2009 by Sunshine. This is despite the seemingly wide scope of cl. 7 of the same which reads as follows:

> Sekiranya Bank menerima apa-apa wang yang berlebihan dari Wang Pokok dan Keuntungan terakru atasnya sepertimana yang telah ditetapkan dalam Surat Tawaran tersebut atau mengikut apaapa kadar atau kadar-kadar lain yang ditetapkan oleh Bank dari semasa ke semasa menurut budi mutlaknya maka Bank bersetuju memulangkan apa jua lebihan setelah ditolak semua perbelanjaan sampingan yang perlu kepada Penyerah Hak dengan serta merta atau dengan seberapa segera yang praktikal.

[126] The above is of no relevance and of no effect as Sunshine's DOA 22 May 2009 is still good and valid and the same has not been legally revoked.

[127] At the risk of repetition, hence the DOA 16 July 2009 is invalid and of no legal effect. Even if it can be remotely argued that GMH knew of the DOA – 16 July 2009, the fact is that this deed had contradicted the Sunshine's DOA 22 May 2009 and there is no evidence that this Sunshine's DOA 22 May 2009 was ever revoked. There is also no evidence that the bank had procured the express agreement of GMH for the DOA – 16 July 2009. The bank without the consent of GMH for the DOA – 16 July 2009, had indeed wrongly made payment into MIB account as demanded by Sunshine, who is not the customer of the bank. The bank had clearly breached the facilities contract with GMH by the action it took in respect of this invalid DOA – 16 July 2009.

[128] Sunshine's unwarranted DOA – 16 July 2009 is the catalyst that caused the bank to breach its contract with GMH. Sunshine has no reason to demand that the balance proceeds should be deposited in MBI by the bank as it has assigned all its rights, interests and entitlements by Sunshine's DOA 22 May 2009.

[129] Sunshine's conduct had indeed interfered with the banker/customer relationship between the bank and GMH. The bank in turn should not have accepted the DOA – 16 July 2009 in view of the terms of DOA 22 May 2009 that Sunshine has assigned all its rights. Ironically, even the bank agreed that DOA – 16 July 2009 is a nullity and unlawful.

[130] It is also relevant to note that the financing facilities had been granted by the bank to GMH well before the issuance of the DOA – 16 July 2009. It could not play a part to the validity of the agreements on the facilities, especially when the bank now takes the position that the DOA – 16 July 2009 is invalid.

Whether The Bank Breached The Agreement To Pay GMH's Suppliers And Subcontractors

[131] There is also evidence that the bank by its letter dated 1 June 2010, wrote informing GMH and Sunshine that in ensuring the project is not impeded, the bank will pay the subcontractors and suppliers directly and not be involved in the dispute between GMH and Sunshine. Despite this letter, the bank failed to honour its words, by withholding interim payment No. 29, putting its own customer GMH in further difficulties as these GMH's subcontractors and suppliers were not duly paid. This agreement to pay GMH's subcontractors and supplier is also referred to as project payment arrangement.

[132] We also can see no reasons to disturb the finding of fact by the learned judge that it is not true for the bank to assert it did not make such payment as the directors of GMH had failed to provide the bank with GMH's list of creditors. In this regard, the learned judge had correctly found there were letters sent by GMH to the bank that showed GMH had informed the bank that if it did not pay the suppliers and subcontractors, the bank would be in breach. The bank replied to these letters not raising the issue that it could not make payment as it did not have the list of GMH's creditors, suppliers and subcontractors but because of the pending injunction and the terms of the DOA – 16 July 2009.

[133] In addition, we find no reason to depart from the finding of the learned judge that the bank subsequently had failed to remit the balance proceeds to GMH's account at AFB after initially doing so. This is another instance of the breach of contract on the part of the bank.

Whether The Amount Held Back By The Bank For GMH's Suppliers And Subcontractors Is De Minimis

[134] We agree that the withholding of RM1,447,443.38 by the bank against GMH is not *de minimis*. This amount is still needed to keep the project going. This amount although relatively small in comparison to the value of the project of RM400,900,000, must still be paid to GMH for the construction of the project to run smoothly.

[135] In consequence, the withholding of this amount by the bank is a breach of contract and breach of the instruction of GMH to the bank that its suppliers and subcontractors be paid directly by the bank. In this regard, the bank had written a letter saying and agreeing it will pay the suppliers and subcontractors directly, as requested by GMH.

[136] Indeed, part of the financing facilities granted to GMH by the bank is to pay the suppliers and subcontractors. Whatever amount towards this is therefore crucial for the success of the project. Hence, the amount of RM1,447,443.38 could not be *de minimis*.

[137] Further, the bank did not plead the allegation that this amount is *de minimis.*

Whether The Guarantors Could Still Be Bound As The Bank Had Breached Its Agreements With The GMH As The Principal Borrower

[138] As said earlier, we agree that the bank had breached the contract with GMH. Therefore, there is no basis for the bank to claim against the guarantors. On this point, the case of *Mayban Finance Bhd v. Yau Jiok Hua & Anor* [2007] 7 CLJ 609 had correctly been referred where it was held when the principal debtor is excused or its liability terminates, the guarantors is discharged from his secondary obligation. The breach of the facilities

agreements by the bank with GMH and the project payment arrangement, means that the guarantors for GMH could not be held liable for the agreements between the bank and GMH.

Whether There Is Agreement By The Bank's Counsel That In The Event There Is A Breach Of The Contract By The Bank Against GMH, The Guarantors Could Not Be Held Liable For Their Guarantees

[139] It is clearly noted by the learned judge in his grounds of judgment that counsel for the bank had agreed that if GMH succeeds in its counterclaim against the bank for breach of contract, then the bank's claim against the guarantors would automatically fail. This is seen in the case of *Mayban Finance Bhd v. Yau Jiok Hua & Anor* [2007] 7 CLJ 609 where it was held that when the principal debtor is found not liable, the guarantors is discharged of their obligations.

[140] As GMH had succeeded in proving that the bank had breached the contract, the guarantors could not be held liable against the bank.

Whether GMH Induced The Bank To Breach Its Agreement With Sunshine

[141] First, there could not be a breach by the bank against Sunshine as the latter had agreed to absolutely assign all its rights under Sunshine's DOA 22 May 2009. Therefore, there was nothing further to assign under the DOA – 16 July 2009 by Sunshine. Thus, the DOA – 16 July 2009 is invalid and of no legal effect.

[142] As a consequence, GMH could not induce any breach by the bank against Sunshine. There is simply no agreement between the bank and Sunshine for GMH to induce the bank to breach against Sunshine.

Whether The Mareva Injunction Obtained By Sunshine Meant That The Bank Is Estopped From Paying GMH's Suppliers And Subcontractors

[143] It is contended that the bank is free from blame not to honour the agreement to disburse the interim payments to GMH's suppliers and subcontractors in view of the *Mareva* injunction obtained by Sunshine. However, as noted by the learned judge, the injunction was only obtained after interim payment No. 29 was received from JKR. Therefore, it was wrong for the bank to withhold this payment from GMH's suppliers and Sunshine.

[144] We agree with the learned judge that this is akin to the position in the case of *Direct Express (M) Sdn Bhd v. Affin Bank Bhd* [2016] 1 LNS 118; [2016] 8 MLJ 763. The court decided that since the customer had instructed the bank to pay its own subsidiary, it was wrong for the bank to disobey this instruction and instead pay the contractor. The relevant passage of the case reads as follows:

[27] Accordingly I observed that it is the appellant that mandated and instructed the respondent to disburse the loan for each and every progress payment since the commencement of the construction works of the project. In this respect the payee was Fairon for progress payment certificates Nos 1 to 7 as so directed. This is the established course of dealing between the parties and the respondent must be estopped from contending that there is neither the right nor the ability of the appellant to dictate the payee to the respondent. The authority for this proposition is in the Federal Court case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 where Gopal Sri Ram JCA (later FCJ) held the following:

> The fundamental principle is that stated by Lord Cairns LC, *viz*, that the representor will not be allowed to enforce his rights where it would be inequitable having regard to the dealings which have thus taken place between the parties. To establish such inequity, it is not necessary to show detriment; indeed, the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights. Take the facts of *Central London Property Trust Ltd v. High Trees House Ltd.* [1946] 1 All ER 256; [1947] KB 130, the case in which Denning J breathed new life into the doctrine of equitable estoppel. The representation was by a lessor to the effect that he would be content to accept a reduced rent. In such a case, although the lessee has benefited from the reduction in rent, it may well be inequitable for the lessor to insist on his legal right to the unpaid rent, because the lessee has conducted his affairs on the basis that he would only have to pay rent at the lower rate; and a Court might well think it right to conclude that only after reasonable notice could the lessor return to charging rent at the higher rate specified in the lease.
>
> Furthermore it would be open to the Court, in any particular case, to infer from the circumstances of the case that the representee must have conducted his affairs in such a way that it would be inequitable for the representor to enforce his rights, or to do so without reasonable notice.

[145] We would continue to say that the learned judge was not wrong to note based on the above, that since there is already an established course of dealing or pattern of payment by the bank for GMH or the very least its suppliers and subcontractors, it would be a breach of contract by the bank against GMH or breach of the agreement to pay GMH's supplier and sub-contractors for the bank to suddenly stop that arrangement. GMH could no longer be bound by the financial facilities agreements with the bank as the latter had breached the contract.

[146] We also agree that the learned judge was not completely wrong to note the public interest nature in the project as it is to build a hospital undertaken no less by JKR. We also do not think that the learned judge was in error to note the public interest element of the project could under the circumstance

override the commercial and monetary interests of the private parties in this case. The fact is that even before the injunction was granted for Sunshine, the bank unlawfully stopped payment to GMH or its suppliers and sub-contractors.

Whether Sunshine Acted Wrongly In Having The Bank Breach The Contract

[147] The learned judge found that Sunshine by its written representations and demands and various meetings with the bank's officers, brought persistent actions against the bank causing the bank to erroneously not pay interim payment No. 29 to GMH or to GMH's suppliers and subcontractors. We see no reasons to disturb this finding of fact by the learned judge.

[148] The actions referred above by Sunshine were brought by its unlawful reliance on the DOA – 16 July 2009. The bank too was under the mistaken understanding that it was bound by the DOA – 16 July 2009. Both, Sunshine and the bank's erroneous understandings of the DOA – 16 July 2009, obviously are at the expense of GMH and its suppliers and subcontractors. Hence, GMH could not be liable for the main suite between Sunshine against GMH and the bank's counterclaim against GMH.

[149] Therefore, the learned judge's finding that Sunshine's actions amounted to the tort of interference and inducing the bank to breach its contract with GMH is not wrong and should be upheld.

Whether There Was Delay By GMH In Completing The Project

[150] Sunshine alleged it was in position to terminate the agreement with GMH as there were unjustified delays by GMH to complete the project. Again, on this issue, the learned judge had rightly perused the relevant correspondence and found no evidence of delays. In fact, JKR as the employer, did not at any time impose LAD for any delays.

Whether There Was Agreement To Increase Percentage Of Entitlement

[151] The learned HCJ also correctly found there was no evidence to indicate that GMH agreed to Sunshine's entitlement of 9.8% of the balance proceeds and not 5%. At best there was only negotiation for that percentage of balance proceeds to Sunshine but this at any point in time was never agreed by GMH. In this regard, in the Court of Appeal case of *Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka M.R.L. Murugappa Chettiar, Simati) v. Lee Teck Mook* [1995] 2 CLJ 545; [1995] 1 MLJ 782 Gopal Sri Ram JCA (as he then was) said:

> It is axiomatic that negotiations for a contract, however advanced, do not amount to a contract.

Whether There Was A Case Against Elvin By Sunshine

[152] Elvin is also made the defendant in the main suite by Sunshine. However, the learned judge did not find evidence against Elvin proven by Sunshine. In fact, the judge found no valid cause of action as against Elvin that has been made out by Sunshine.

[153] We can find no reason to dispute the learned judge's findings. The finding of fact by the learned judge is not obviously wrong. Merely for Sunshine to assert that Elvin had misrepresented by saying that GMH is able to complete the project is not sufficient. Indeed, in order for the project to be completed, surely GMH would need financial facilities. This was without dispute provided by the bank initially and Sunshine was fully aware of it. We could not find that the learned judge under the circumstance, is wrong to conclude that Sunshine had failed to prove its case against Elvin.

Whether It Was Procedurally Correct For The Bank To Counterclaim Against The Guarantors

[154] The bank filed action to counterclaim against GMH. By the counterclaim, the bank added the guarantors as parties. It is based on the personal guarantee and joint and several guarantees. The bank's claim has no nexus or connection with Sunshine's claim. Sunshine is also not a party in the bank's counterclaim. The bank sued GMH as principal debtor and could have done the same against the guarantors but it did not do so.

[155] They were sued as being guarantors alone and the cause of action against them crystallised by the bank's letter of demand dated 29 October 2010. The writ was served by Sunshine on the bank on 11 June 2010. The bank filed defence on 14 July 2010 without a counterclaim.

[156] The writ is dated 4 June 2010. The cause of action against the guarantors accrued.

[157] Thus, when the writ was filed and when the defence was filed by the bank, there was no cause of action against the guarantors. The learned judge's finding that the question is whether the bank's counterclaim against the guarantors was premature and whether s. 31 of the Limitation Act 1953 applies.

[158] The bank's counterclaim against the guarantors was correctly decided by the learned judge to be premature as the counterclaim was filed against the guarantors before the cause of action accrued only on 29 October 2010 by the letter of demand. Further, s. 31 of the Limitation Act 1953 also applies as it states as follows:

> For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the setoff or counterclaim is pleaded.

[159] The HC was also not in error to refer to the Federal Court case of *Sio Koon Lin & Anor v. SB Mehra* [1980] 1 LNS 135; [1981] 1 MLJ 225 that established an action filed is premature if it is filed before there is a cause of action.

[160] The learned judge also is not wrong to find that the bank's counterclaim against the guarantors has no relation to Sunshine's claim against the bank. Thus, based on the principle as enunciated in *Esso Standard Malaysia Bhd v. Southern Cross Airways (Malaysia) Bhd* [1972] 1 LNS 31; [1972] 1 MLJ 168, the bank's counterclaim is also procedurally defective. In this case it is held as follows:

> It is settled law that a counterclaim cannot be maintained unless it is shown that the relief claimed is sufficiently connected with or allied to the subject matter of the principal claim as to make it necessary in the interests of justice that it should be dealt with along with the claim. Thus, a counterclaim for libel cannot be maintained in a claim for money lent.

Conclusion

[161] On the whole, it could not be said that the learned judge was plainly wrong in his decision to dismiss the claim of Sunshine and also to dismiss the counterclaim of the bank. Premised on all the explanations we have given here, the learned judge was also not plainly wrong to allow GMH's counterclaim against Sunshine and the bank. Neither was the learned judge plainly wrong to allow the guarantors' counterclaim against the bank.

[162] In this regard, we are guided by the Federal Court case of *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 where it held as follows:

> As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

[163] Based on the reasons we have given here, we are unanimous that the learned judge's decisions at the HC should be affirmed. Therefore, both appeals should accordingly be dismissed with costs for the respondents.